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Clifford G. Crane and Bonnie Crane, husband and wife v. Timberbrook Village, LTD., a Utah limited partnership, Heart Marketing and Development, Inc., a Utah corporation, in its capacity as general partner of Timberbrook Village, LTD., Leisure Sports, Inc., a Utah corporation, and Dixie Title Company, a Utah corporation : Brief of Respondent

Utah Court of Appeals

Michael D. Hughes; Thompson, Hughes & Reber; Attorneys for Respondents.
Willard R. Bishop; Bishop & Ronnow; Attorneys for Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

CLIFFORD G. CRANE and BONNIE CRANE, husband and wife, Plaintiffs-Appellants, vs. TIMBERBROOK VILLAGE, LTD., a Utah limited partnership, HEART MARKETING AND DEVELOPMENT, INC., a Utah corporation, in its capacity as general partner of TIMBERBROOK VILLAGE, LTD., LEISURE SPORTS, INC., a Utah corporation, and DIXIE TITLE COMPANY, a Utah corporation, Defendants-Respondents.	89 -CA Case No. 870366 Argument Priority Classification: 14b

RESPONDENTS' BRIEF ON APPEAL

Appeal from the Judgment of the
Fifth Judicial District Court for Iron County
The Honorable J. Philip Eves, District Judge

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ADDENDUMS ATTACHED

* * *

KEY TO ABBREVIATIONS

AB	Appellants' Brief
D	Defendants' Exhibit
Mixon	Deposition of Dean Mixon, Esq.
P	Plaintiffs' Exhibit
R	Record
T1	Reporter's Transcript of Trial August 4, 1987
T2	Reporter's Transcript of Trial august 5, 1987

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JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction of this Court for purposes of this appeal is vested pursuant to Section 78-2-2(3)(i) of the Utah Rules of Civil Procedure [hereinafter U.R.C.P.]. The case history recited by Appellants under the heading "Statement of the Case", found in Appellants' brief [hereinafter AB] at pages one through four, is, by and large, accurate insofar as it comprises a basic chronological recapitulation of the pleadings found in the record on appeal. As a result, no additional statement need be added here. (See Rule 24(b) Utah Rules of Appellate Procedure.)

STATEMENT OF ISSUES PRESENTED ON APPEAL

Respondents believe the following issues constitute the appropriate scope of judicial review in the instant case:

I. Appropriate standards of appellate review compel the affirmation of the trial court's judgment; this affirmation is further compelled by an examination of the credibility of Appellant Crane.

II. No agreement was ever timely reached between the parties; the mail-box rule is inapplicable in the instant case.

III. Respondents' offer was effectively withdrawn on February 22, 1985.

IV. Appellants' acceptance of Respondents' offer was conditional and constituted little more than a counteroffer.

V. Equity compelled that Appellants not prevail in the instant suit.

CONSTITUTIONAL OR STATUTORY PROVISIONS

Where necessary, Respondents shall cite to appropriate constitutional and statutory provisions within the body of the brief and will quote the same, unless otherwise noted, in their entirety.

STATEMENT OF THE CASE

Appellants' brief properly recites the chronology of the case. (See AB "Statement of the Case" at 1-4.) Furthermore, the following two paragraphs, once again excerpted from Appellants' brief, accurately identify the nominal parties in this case:

> TIMBERBROOK VILLAGE, is a Utah limited partnership which is in the business of real estate development and sales in southern Utah. HEART MARKETING, is a Utah corporation which serves as general or managing partner of TIMBERBROOK VILLAGE. LEISURE SPORTS, is also a Utah corporation. Mr. Barry Church is the President of HEART MARKETING as well as LEISURE SPORTS. Mr. Russell Gallian is a shareholder of LEISURE SPORTS.
>
> CLIFFORD CRANE, is a limited partner of TIMBERBROOK VILLAGE, owning twenty-five percent (25%) of the partnership interest. (AB at 4, citations omitted)

In addition to the above, Russell J. Gallian, Esq. [hereinafter Gallian], was at all relevant times Chairman of the Board of Directors of Leisure Sports, Inc. [hereinafter Leisure Sports] and also acted in the capacity of its attorney.

Dixie Title Company [hereinafter Dixie Title] was the designated escrow agent for depository purposes in reference to the initial offer by Timberbrook Village, Ltd. [hereinafter Timberbrook] to purchase the limited partnership interest held by Clifford G. Crane [hereinafter Crane]. Doug Westbrook is the Manager of Dixie Title Company. Bonnie Crane is the wife of Clifford Crane.

The foregoing appropriately identifies the named parties and, where applicable, their principals and agents. This summation is perhaps necessary so that the varying interests of those who have given testimony in this case may be appropriately identified throughout the transcript of the two-day trial. All parties have been properly joined.

As the basic overview of the facts in this case may be

gleaned from the reporter's transcript of Judge Eves' ruling coupled with the executed findings of fact and conclusions of law themselves, Respondents have attached these documents in the appendix as Addendums "1" and "2," respectively. (Cf. R at 332, 305-15) For purposes of this appeal, however, Respondents believe that the core of the trial court's judgment, appended hereto, is bottomed in the testimony of four people, three of whom are attorneys.

Timberbrook, throughout all relevant times herein, was represented by Mr. Russell Gallian, who also served as the Chairman of the Board of Directors of Leisure Sports, the proposed purchaser of Crane's interest in Timberbrook. Crane was represented at all relevant times by Mr. Dean Mixon, Esq., a California attorney, whose deposition was taken at his offices and published for purposes of trial. (D-29) In Utah, Crane was represented by Mr. Willard R. Bishop, Esq.

As the trial court's primary function below was to weigh the veracity of those testifying before it, it is important to note that in those particular and peculiar aspects of Crane's testimony where his attorneys might otherwise have verified or corroborated his statements, their testimony ran at odds thereto. This point is more particularly set forth as part of Argument I, infra. Indeed, Crane's attorneys not only corroborated the testimony of Mr. Gallian, but provided, by means of impeachment, a substantial basis from which the trial court could readily disregard all of the material testimony proffered by Crane. With the foregoing in mind,

the following facts appear probative to the trial court's decision in favor of Respondents.

* * *

Prior to 1984, Appellant Clifford Crane purchased a 25% interest in Timberbrook. (Finding of Fact No. 2) In late 1984, Leisure Sports and Heart Marketing and Development, Inc., the general partner of Timberbrook, desired to repurchase the interest of Crane in said partnership. (Finding of Fact No. 3) As of November 13, 1984, Timberbrook and Crane had reached in principle an oral agreement which, to be valid and enforceable, was to be reduced to writing, signed by the Cranes, and deposited by them at Dixie Title along with executed assignments of their partnership interests. These requirements were expressly necessary to complete the transaction. (Finding of Fact No. 4) Indeed, as forwarded to the Cranes by Gallian on behalf of Leisure Sports, the proposals to purchase Appellants' partnership interest had already been signed in good faith by the principals of Leisure Sports. (See P-7, P-8, and P-9.)

No consideration had been tendered by Crane in exchange for the offer to purchase his interest, nor for the drafting or transmittal of these documents. As set forth, the documents propose an exchange of Crane's limited partnership interest for $175,000.00 in cash, and unit 210 in building 1 of Timberbrook Condominiums. (P-8 and P-9) The agreement and closing thereon were expressly made contingent on Crane's execution and delivery to Dixie Title of these documents. (Finding of Fact No. 7)

Indeed, both Exhibits P-8 and P-9 expressly dictate to Crane that the assignment of his limited partnership interest "shall be deposited with escrow agent to be delivered to buyer upon closing." (See P-8 and P-9; cf. Finding of Fact No. 7.)

Since this exchange contemplated both the transfer of monies and title to a condominium, the matters fell squarely within Utah's statute of frauds, found in Title 25 of the Utah Code. As of November 20, 1984, Respondents had already caused to be placed in escrow $175,000.00, and Mr. Gallian had further obtained, as required by P-8 and P-9, the release of Appellants from a loan guarantee earlier executed by Appellants. (See P-6; cf. P-14.) As stated by Judge Eves at R. 332 at 3, however, "[s]ome of those items had not been discussed nor settled in the oral agreement." (Id., emphasis added)

After Crane returned to California, he became dissatisfied with the $175,000.00 or the monetary element of Respondents' offer and retained Mr. Mixon, his California attorney. (Deposition of Dean Mixon, D-29 at 16, 30, and 31 [hereinafter Mixon]) Mr. Mixon initially contacted Gallian on January 4, 1985. His "sole purpose in the phone call was to try to get additional money out of the buyer." (Mixon at 32) This call occurred at 3:01 in the afternoon and lasted for ten minutes. Immediately thereafter, Mixon spoke to Crane for 15 minutes, and one minute later to Attorney Hans Chamberlain, of Cedar City, Utah, for five minutes. One minute thereafter, Mixon contacted Mr. Willard Bishop, Appellants' counsel. Crane subsequently retained Bishop to seek a

complete accounting from Timberbrook, ultimately initiating a lawsuit through Bishop's office for this purpose. The trial court took judicial notice of this suit, filed in Iron County, Civil No. 85-066. (Reporter's Transcript August 4, 1987, at 42 [hereinafter T1]; see also phone records of Dean Mixon, page 6, for January 17, 1985, appended to Mixon deposition D-29.) Mixon's phone records further show that he had no further contact with Bishop through March 16, 1985. Pursuing Appellants' suit for an accounting, Bishop forwarded letters, with the express written authorization of Mr. Crane attached thereto, requesting a comprehensive accounting of the limited partnership pursuant to Section 48-2-10 of the Utah Code. (P-10-A and P-11-A)

Meanwhile, Mixon continued his efforts to "up the price" in Respondents' offer to purchase Crane's interest previously received in November, though Bishop was totally unaware of this offer! (Mixon at 16, 30, 31, 32, 44, and 47) Gallian expressly confirmed Mixon's testimony at trial. (T1 at 261-62)

Bishop ultimately filed his suit for an accounting on February 12, 1985. On the 13th of February, he received P-13, a letter drafted by Gallian and directed to Bishop in response to Bishop's earlier letters. (P-10-A and P-11-A) When Bishop received this letter, he was as yet uninformed that Mixon was negotiating in California for the sale of Crane's partnership interest to Respondents. (T1 at 248) Gallian still assumed that the various problems with Crane had been solved. (P-13) After receiving Gallian's letter on February 13, 1985, Bishop telephoned

Crane. Judge Eves expressly found that during this conversation with his Utah counsel on February 13, 1985, "Mr. Crane told Mr. Bishop that he had not yet accepted the outstanding offer; that he wanted to go ahead with the accounting." (R 332 at 4; see also T1 at 249-50.) Judge Eves clearly found that these actions indicated that Crane "did not feel that he had a binding agreement at the time, but was in the position of being in receipt of an offer, which he was either free to accept or reject." (R 332 at 4; Finding of Fact No. 8)

Upon discovering that the accounting lawsuit had been filed (Iron County Civil No. 85-066) on February 12, 1985, Gallian telephoned Bishop on February 15, 1985, expressing extreme displeasure over the status of the negotiations regarding the November, 1984, purchase offer. (T1 at 251, 276-77) Bishop's recollection of this conversation was so clear that he spontaneously confirmed Gallian's statement regarding the same while Gallian was being questioned by Mr. Hughes. (T1 277) Bishop's letter of February 18, 1985, according to Bishop, correctly memorialized Bishop's conversation with Appellant Crane, Bishop's client, and, indeed, the information Bishop passed on to Gallian on February 15, 1985. The text of that letter is telling:

> I received your letter on 13 February 1985 and spoke with Mr. Clifford G. Crane on the same day. His information to me was that your people have made him an offer, but that he has not yet accepted it, and desires to proceed [with the accounting suit] until he does accept your settlement offer, if he does, in fact, accept it. (P-15-A)

A postscript to that letter indicates that it was dictated before Gallian and Bishop spoke, but the substance of their oral conversation was no different.

Not surprisingly, Crane vehemently denied at trial that he hired Mixon to obtain more money, and further stated to the trial court that Bishop's letter of February 18, 1985, did not then correctly state Mr. Crane's state of mind. (See T1 at 6, 67, 69, 71-73, 87-88, 127, 129, 131, and 138.)

Only days before, on February 11, 1985, and simultaneous to the drafting of P-13 to Bishop, Gallian had sent a copy of the substitution of guarantor, personally certifying its authenticity, to Mr. Mixon. (P-12) In that letter, Gallian reaffirmed the offer and re-expressed the parties' understanding that Crane would execute the documents and that "[u]pon receipt the escrow agent will disburse $175,000.00 to your clients and Barry Church will execute a warranty deed on behalf of the partnership for the condo." Gallian's concurrent letter to Bishop, with similar naivete, indicated that he and Mr. Church were still "awaiting documents to be placed in escrow at Dixie Title Company, at which time the closing will be completed and Mr. Crane will no longer be associated with Timberbrook." (P-13) Both of these letters restated the simple condition that Crane be required to execute and deposit with the escrow agent Dixie Title the initial offer sent to Crane and received at trial as P-8 and P-9.

On the same day that Bishop mailed Gallian his letter indicating Crane's nonacceptance of Respondents' offer, Mixon

testified that he drafted P-18, a letter to Dixie Title Company, enclosing the originals of P-8 and P-9, but additionally setting forth three conditions to the closing of the transaction. Primary among these conditions was a request that the escrow agent independently receive a separate affirmation of the validity of the substitution of guarantor document earlier enclosed in and verified by Gallian's letter. (See P-12; cf. P-18.) Mixon conceded that his cover letter was firm and that, without dispositive proof of the authenticity of the substitution of guarantor, it was not Mixon's intent that the deal close. (See Mixon at 22-24, 37.) Crane conceded that Mixon not only requested independent verification, but an original of the substitution itself. (T1 at 146) Again, not unsurprisingly, Crane testified at trial, "I was not a party to writing those three conditions. My attorney wrote those. . . . We talked about it since then. We didn't talk about it before he wrote it, though." (T1 at 170) Crane conceded at trial, however, that, without independent verification of the substitution, he would not have closed. (T1 at 149)

Initially, there was some confusion as to whether Mixon's letter with its contingencies and enclosures were deposited with Dixie Title prior to February 22, 1985. (P-18) Upon examination of the Dixie Title's files, however, Respondents' counsel discovered the envelope from Weinfield and Mixon, which was marked as P-19-A. Mailed by regular domestic mail, the stamp from the Santa Ana, Orange County, California post office indicates a mailing in the p.m. of February 21, 1985. (P-19-A) Corroborative thereto,

at approximately 6:07 p.m., Pacific Standard Time, on February 21, 1985, Mixon telephoned Crane at Crane's house. Mixon conceded that this 11-minute phone call was probably to notify Crane that Mixon had mailed the letter, with its enclosures, earlier in the afternoon. (Mixon at 54-55)

After Barry Church was served on February 13, 1985, in the Timberbrook accounting suit, Iron County Civil No. 85-066, and subsequent to Gallian's conversation with Bishop on February 15, 1985, Gallian and Church spoke extensively, as they were together opening up, for President's Day weekend, a resort in southern Utah commonly known as Mt. Holly. (T1 at 279-80) Exasperated by Crane's contrary tactics, Church and Gallian decided to withdraw the offer to purchase Crane's interest.

On Friday morning, February 22, 1985, Gallian received a phone call from Crane. Exhausted from the weekend, Gallian initially had failed to follow up on a personal commitment to Barry Church to notify Crane that the deal was off. (T1 at 276-80) And, though shocked at receiving telephonic contact from Crane, Gallian immediately advised Crane that the deal was off, testifying to the following:

> I answered the phone, and as he started the speech, I told him words to the effect, "Mr. Crane, before you start, I need to tell you that the deal is off." (T1 at 281)

Gallian further testified that Crane <u>never</u> advised him that Mixon had mailed the documents the day before. (T1 at 282-83) The thrust of Gallian's statements in this conversation, however,

was unequivocal, and Gallian subsequently advised Doug Westbrook on the same morning at Dixie Title that the offer was no longer open for acceptance and that the deal was off. (T1 at 182, 185, 195, 211, 223-25, and 283) Westbrook subsequently testified that Dixie Title did not receive the documents forwarded by Mixon until the 25th or 26th of February during the following week. (T1 at 225) Crane's initial telephone call with Gallian took three minutes and occurred at 11:57 a.m. Eastern Standard Time. (P-22) Forty minutes later, at 12:37 p.m. Eastern Standard time, Crane sent a mailgram (P-21) attempting to unilaterally withdraw the conditions set forth in Mixon's cover letter mailed February 21, 1985. (See P-21; cf. P-18.) This initial telegram was sent only 16 minutes after a phone call in which Gallian had further indicated to Crane that he did not desire to revive or otherwise reopen the offer for acceptance. (T1 at 283-84; cf. P-22.) As an aid to this Court, Mr. Gallian's telephone number, as set forth in Appellant Crane's telephone records, is (801)628-1682.

On the 27th day of February, 1985, Crane ultimately phoned Gallian and threatened a suit, from which suit this appeal has been taken. (T1 at 289-90; P-24) Later that morning, immediately after that phone call to Gallian, Crane phoned Mr. Bishop's office in Cedar City, Utah, at (801)586-9483. (P-24) Later that afternoon, just prior to 5:00 p.m. Mountain Standard Time, Crane once again attempted to withdraw by mailgram an additional criterion of closing set forth in Mixon's letter. (P-25) A final mailgram allegedly waiving any other problems in the closing of

escrow was sent by Dean Mixon to Dixie Title on March 7, 1985. (P-26) This suit followed.

The trial court, having heard the testimony of all the parties, and, indeed, having reviewed the testimony of three attorneys as well as that of Mr. Crane, stated the following from the bench:

> On February 22, 1985 Mr. Crane called Mr. Gallian, and I believe that he was told at that time that the deal was off. As it turns out, however, and as you will find in a few minutes, it really doesn't make any difference. . . .
>
> Based on the testimony of Mr. Westbrook, Mr. Crane, and Mr. Gallian, as well as the postmark on the Mixon letter, I find that the acceptance of the sale terms had not reached the escrow on the morning of February 22, 1985, but arrived after Mr. Crane had been told, as had Mr. Westbrook, that the deal was off. (R 332 at 5-6)

Thereafter, the trial court found that the letter of Mixon and the contingencies stated therein, nonetheless, formed little more than a counteroffer which could thereafter be accepted or rejected by Respondents even had the documents otherwise timely arrived in escrow. (Findings of Fact No. 19)

SUMMARY OF ARGUMENT

I. The standard of review under Utah law provides that findings of fact entered by a trial judge shall not be set aside unless clearly erroneous. In light of this standard and the exclusive prerogative of the trial court to weigh the credibility of the witnesses, it becomes incumbent upon this Court to note the

various contradictions of Crane's testimony, particularly when compared to the testimony of his two attorneys. A plethora of evidence supports the trial court's ruling.

II. No enforceable agreement was reached between the parties in a timely fashion; the mail-box rule is inapplicable. This follows by reason of the fact that Crane retained Mixon because he was dissatisfied with the monetary terms of the purchase offer, and further initiated a lawsuit contrary to an intent to sell; to-wit: the suit for accounting, Iron County Civil No. 85-066. As the offer sent to Crane clearly set forth that acceptance would occur only upon deposit of the fully executed documents in escrow, the mail-box rule is inapplicable. Clearly, Gallian's letters in February also indicated that closing was dependent upon receipt by the escrow agent of the documents.

III. An offer to sell real estate unsupported by consideration may be withdrawn at any time before its acceptance. This withdrawal may be oral or in writing and may be implicit as well as expressed.

IV. The letter of Mixon, as framed by Mixon and as understood by Mixon as well as Gallian, constitutes a rejection of the terms of the original offer and, thus, a counteroffer. The additional document requested by Mixon was not earlier requested by Appellants or their attorneys, and indeed, as interpreted by Appellants, required both the original of the substitution as well as a separate, independent document verifying the authenticity of the former. These documents were not in the possession of Respon-

dents, nor could they genuinely come into their possession.

V. Appellants did not discharge their obligations in good faith, and as such are not otherwise entitled to specific performance under Utah law. While good faith is implicit in every contract, when an offer is extended without consideration supporting the same, Appellants are required in good faith to timely accept, without qualification, Respondents' offer, if they intend that Respondents be similarly bound. In this case, Appellant Crane's actions belie his integrity and should preclude him from prevailing on appeal.

ARGUMENT

I.

APPROPRIATE STANDARDS OF APPELLATE REVIEW COMPEL THE AFFIRMATION OF THE TRIAL COURT'S JUDGMENT; THIS AFFIRMATION IS FURTHER COMPELLED BY AN EXAMINATION OF THE CREDIBILITY OF APPELLANT CRANE.

Under Utah law, cases for specific performance have always required a greater degree of certainty in establishing the terms of an agreement than is necessary to establish a contract as the basis of an action at law for damages. Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491 (1967). Prior to July 1, 1985, Article VIII, Section 9 of the Utah Constitution specifically set forth a greater standard of review in equitable cases. See e.g., Reed v. Alvey, 610 P.2d 1374 (Utah 1980); Bown v. Loveland, 678 P.2d 292 (Utah 1984). Under this standard, the Supreme Court did not reverse the trial court's judgment unless the evidence in the

case clearly preponderated against its findings. In Adams v. Gubler, 731 P.2d 494 (Utah 1986), however, Justice Durham, speaking for a unanimous Utah Supreme Court, noted that even though the former constitutional section had been redrafted, Rule 52(a), U.R.C.P., which became effective January 1, 1987, provides that findings of fact "shall not be set aside unless clearly erroneous . . ." Id. at 496, n.3. Thus, regardless of whether the case is won in equity or won in law, Rule 52(a), U.R.C.P. mandates that the factual finding of the trial court may be set aside on appeal only if they are clearly erroneous. Barker v. Francis, 741 P.2d 548 (Utah App. 1987); see also Lemon v. Coates, 735 P.2d 58 (Utah 1987).

The second portion of Rule 52(a), U.R.C.P. indicates that due regard "shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The credibility of Crane below, evident from the record and the recitation of facts supra should be duly noted by this Court. Indeed, Crane contradicted the testimony of both his counsel. For example, although Mixon testified repeatedly that he had been retained by Crane to get additional money from Respondents, Crane wholeheartedly denied this. (Mixon at 16, 30, 31, 32, 44, and 47) Indeed, Crane blithely testified at trial that Mixon's sole purpose was to review the correctness of the exhibits and to confirm the substitution of guarantor. (T1 at 124) Further, Crane repeatedly denied telling Mixon that he was ever unhappy with the monetary terms of the offer. (T1 at 127, 129, 131, 137-8, 139, and 140) Additionally,

though Bishop spoke to Crane on the 13th day of February and testified that Crane had told him that the Respondents' offer had not been accepted, Crane stated that Bishop's understanding was wholly contrary to his (Crane's) state of mind. (T1 at 87-88; cf. T1 at 250)

Not stopping at contradicting both of his attorneys, Crane's testimony, even in its unimportant particulars, directly contradicted the testimony of Russell Gallian. Gallian, for example, testified that, between the 13th day of November of 1984 and the 22nd day of February 1985, he had no phone calls from Clifford Crane. (T1 at 260) On the other hand, Crane testified that he spoke with Gallian several times. On cross-examination, however, Crane could not even prove one such call through his phone records. (T1 at 125-36) This Court should remember that Crane did not simply fall off a pumpkin truck and land in Brian Head, Utah. Crane is a sophisticated businessman, having served as both a President and Vice-President of major communications concerns, some of them with more than 200 employees. (See T1 at 115-16.) Even in signing the original loan guarantee, marked as Exhibit P-6, Crane purposely signed his wife's name in a different color of ink because Crane presupposed this would make his "wife's" signature look more genuine to the lending bank. (T1 at 61, 172, 174) Crane's testimony throughout trial was continuously impeached, largely in part due to the integrity of his counsel, who were simply unwilling to change their testimony to fit that of their client. As Crane was clearly unbelievable under oath, to reverse

the trial court's decision at this time would wholly disregard the ability of the trial judge to discern and sift the truth of these matters from the large amount of testimony at trial.

II.

NO AGREEMENT WAS EVER TIMELY REACHED BETWEEN THE PARTIES; THE MAIL-BOX RULE IS INAPPLICABLE IN THE INSTANT CASE.

The Respondents' offer to Appellants in November of 1984 was given without consideration. The facts abundantly demonstrate that Crane's reaction to the offer, when received, was dissatisfaction with one or more of its material terms. Mixon testified that his sole purpose in contacting Gallian was to express Crane's dissatisfaction with the monetary terms and to get additional money. Furthermore, both Mixon and Gallian knew that absent the receipt of signed documents by Dixie Title the Cranes would not otherwise be bound by Respondents' proposal. (Mixon at 43-44; T1 at 261-62; see also Reporter's Transcript August 5, 1987, R 331 at 20 [hereinafter T2].) Furthermore, Crane's suit for an accounting (Iron County Civil No. 85-066, filed February 12, 1985) clearly indicated Crane's intention to treat the proposal simply as an offer. (T1 at 86, 119-20; cf. P-10-A, P-11-A; see also R 332 at 3-4.) Indeed, as of February 13, 1985, Willard Bishop, Appellants' counsel, was totally unaware that there had even been an outstanding offer to purchase Crane's interest. (T1 at 149)

Point I of Appellants' brief alleges that the common law "mail-box rule" should be applied to this case, contrary to the finding entered by the trial court. The mail-box rule, in general

terms, is bottomed on the proposition that, in general, once an acceptance is deposited in the United States mail, the acceptance is deemed complete. This rule, however, is subject to a wide variety of exceptions, and, indeed, an offeror may restrict the manner of acceptance, provided his or her intention to do so is clearly expressed. Williams v. Singleton, 723 P.2d 421 (Utah 1986) The first sentence in the penultimate paragraph of 77 Am. Jur. 2d "Vendor and Purchaser" § 22 is dispositive in the instant case. Therein the authors clearly set forth the principle as follows:

> Whether a contract is consummated by the posting of a letter accepting an offer is dependent upon whether acceptance by mail was authorized. (Id., emphasis added)

In the instant case, the trial court found that acceptance by simply depositing the documents in the mail was not authorized by the offeror. The only issue before the Supreme Court, therefore, is whether there is any factual basis in the evidence to support this ruling. Both P-8 and P-9 expressly indicate that the assignment of the Cranes' interest in the limited partnerships "shall be deposited with escrow agent to be delivered to buyer upon closing." (See P-8, P-9; cf. P-16, P-17.) Furthermore, in Gallian's letter to Mixon dated February 11, 1985, he clearly states his understanding as follows:

> Upon receipt the Escrow Agent will disburse $175,000.00 to your clients and Barry Church will execute a warranty deed on behalf of the Partnership for the condo. (P-12)

In P-13, Gallian's letter to Bishop, dated February 11, 1985, Gallian once again indicated that both he and Mr. Church were

"now awaiting documents to be placed in escrow at Dixie Title Company, at which time the closing will be completed and Mr. Crane will no longer be associated with Timberbrook." (P-13)

Ultimately, Crane's testimony becomes the most significant argument to sustain the Judge's ruling. On cross examination Crane testified as follows:

> Q [Read] [t]he second page of both P-8 and the second page of P-9, second to last sentence.
>
> A Okay. "The assignment, Exhibit A, shall be deposited with escrow agent to be delivered to buyer upon closing."
>
> Q And you understood who that escrow agent was?
>
> A Dixie Title.
>
> Q And you had to deposit these documents with them, because it's stated on the documents, isn't it?
>
> A Yes. (T1 at 151)

On February 22, 1985, Crane indicates that he expressly told Gallian that the documents "were all signed and in escrow." (T1 at 160) In point of fact, however, Crane conceded this was really simply an assumption. (T1 at 163) The trial court found, based upon P-19-A and the other evidence before it, that the documents indeed had not been placed in escrow as of the morning of February 22, 1985. (Finding of Fact No. 16) As both parties understood that Crane's acceptance was dependent upon the actual deposit of documents with escrow, and as there is evidence to support this conclusion of the trial court, the argument that

simple posting of the documents was sufficient cannot be sustained.

Under basic contract theory, a contract generally arises "from the time that the agent of the offeree communicates the acceptance of his principle to the offeror." See Restatement of Contracts, § 64, Illustration 2. Indeed, the offeror, in this case Respondents, can specify the way in which the offer can be accepted, and an acceptance in any other way is a counteroffer. See Restatement of Contracts, §61, Comment a at 67; see also Frandsen v. Gerstner, 26 Utah 2d 180, 487 P.2d 697 (1971).

In terms of the acceptance in the instant case, both parties understood that acceptance required the actual deposit of documents with the escrow agent. The trial court found that this event had not occurred on the morning of February 22, 1985. This conclusion is abundantly sustainable, but pursuant to Rule 52, U.R.C.P. and the case law cited in Section I, supra, Respondent need only provide enough evidence that the ruling is not otherwise clearly erroneous. Respondents strenuously urge that this portion of the trial court's judgment be sustained.

III.

RESPONDENTS' OFFER WAS EFFECTIVELY WITHDRAWN ON FEBRUARY 22, 1985.

Gallian's testimony and the facts and circumstances relevant to his conversation with Crane on the morning of February 22, 1985, have been set forth above. The trial court, however, was initially concerned whether an offer for the sale of real estate could, without more, be orally withdrawn. The trial court concluded in the affirmative based upon the clear weight of authority in favor of this proposition.

The initial offer from Respondents to Appellants was without any consideration. As such, the offeror can withdraw that offer any time before its timely acceptance by the offeree according to the terms as set forth in the offer. See 17 Am. Jur. 2d "Contracts" § 36; see also Simpson on Contracts 2d "Offer and Acceptance" Ch. 2, § 25. In 91 C.J.S. "Vendor and Purchaser" § 28(b), the authors note that no formal notice of revocation is necessary, and, even were knowledge, for example, of a subsequent sale of the property to indirectly come to the actual knowledge of the prior offeree, this alone would constitute a revocation of the prior offer. See also 17 C.J.S. "Contracts" § 50(d); Wiliston on Contracts § 55.

In the case at bar, Gallian clearly advised Crane on February 22, 1985, that Respondents' offer had been withdrawn. The trial court found that at the time this notice was given Crane had still not performed pursuant to the terms of the offer and,

indeed, pursuant to Crane's own understanding of those terms.

The fact that the revocation of the offer need not be in writing was clearly brought to light by a recent Arizona decision, Allen R. Krauss Co. v. Fox, 132 Ariz. 125, 644 P.2d 279 (Ariz. App. 1982). In Fox, the plaintiff tendered a written offer to purchase Fox's land for $265,000.00 on May 27, 1981. On May 29, Fox responded counterproposing a purchase price for $486,000.00, and requiring acceptance by 6:00 p.m. the following day, to-wit: May 30, 1981. Further negotiations ensued finally resulting in Fox delivering to Krauss a second counteroffer agreeing to the initial purchase price of $265,000.00, but reducing the brokerage commission. Acceptance of Fox's second counteroffer was required by 5:00 p.m. on June 3. At 3:00 in the afternoon on June 3, Fox's real estate agent, Mr. Riley, advised Krauss's agent, Mr. Carson, that Fox "was pulling her property off the market or she just didn't want to sell it . . ." (644 P.2d 280) Thereafter, Krauss, the offeree, immediately executed and delivered his acceptance of the second counteroffer at the title company at 4:15 p.m., 45 minutes before the 5:00 p.m. June 3 deadline. The Arizona appellate court unanimously ruled that the counteroffer of the landowner Fox had been validly withdrawn. The language of the court's opinion states the law which Respondents feel is applicable to the instant case:

> Because the counteroffer was not given for consideration, and even though it was specified for a definite period, it could be revoked at any time before acceptance. See Butler v. Wehrley, 5 Ariz. App. 228, 429 P.2d 130 (1967) (where revocation was not validly communicated and was therefore ineffective); 1 Wiliston on Contracts § 55 "Revocation" (3rd

> ed. 1957). The written counteroffer was orally revoked at 3:00, which was before acceptance, by delivery of the executed acceptance to the escrow agent at 4:15 p.m. Therefore, no contract was created. Restatement [2d] "Contracts" § 36 (644 P.2d at 280)

Similarly, in the instant case, Gallian unequivocally and validly withdrew Respondents' offer prior to its acceptance by Appellants through the depositing of documents with the escrow agent.

IV.

APPELLANTS' ACCEPTANCE OF RESPONDENTS' OFFER WAS CONDITIONAL AND CONSTITUTED LITTLE MORE THAN A COUNTEROFFER.

In general, "[t]o create a binding contract the acceptance must unconditionally agree to all the material provisions of the offer, and must not add any new material conditions . . ." See R.J. Daum Const. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952); see also Williams v. Espey, 11 Utah 2d 317, 358 P.2d 903 at 906 (1961).

In the instant case, Appellants indicate that their acceptance of Respondents' offer was unconditional. While Respondents concede that some of the so-called conditions of Mixon's letter (P-18) may have been implied in the context of the parties' negotiations, other conditions were indeed material and constituted little more than a counteroffer.

Gallian testified that on the 8th day of February 1985 that he spoke with Crane's attorney, Mr. Mixon, in California. In this conversation Mixon requested a copy of the substitution of guarantor document and questioned the authenticity of the same.

Gallian testified that he verified the same as a fellow practitioner. (T1 at 270-71, 284-86) Gallian further testified that on February 8 he understood that his personal verification of the authenticity of the substitution of guarantor document would be sufficient. Three days later, on February 11, 1985, Gallian drafted and signed P-12. Its careful wording is exemplary of Gallian's understanding of this earlier conversation with Mixon:

> Enclosed is a copy of the initial Substitution of Guarantor which I certify was executed by myself and Mr. Dewey Crouch, Vice-President of Nebraska Savings and Loan. (P-12)

In response thereto, Mixon's letter, mailed February 21, expressly instructed the escrow agent that Gallian's verification of the authenticity of the Substitution of Guarantor document was clearly not sufficient to Appellants. Indeed, Mixon testified that without a separate document from Nebraska Savings and Loan verifying the authenticity of the Substitution of Guarantor document it was not Mixon's intent that the deal close. (Mixon D-29 at 37) Mixon fully knew that his cover letter, as read by an escrow agent, would be firm in this matter. (Id. at 22-24) Even Crane admitted at trial that without verification, independent of Gallian's, as to the authenticity of that document, Crane did not intend to go ahead with the transaction. (T1 at 149)

Importantly, the original of the loan substitution document was in the offices of Nebraska Savings and Loan and, indeed, was never received pursuant to Mixon's instructions. (T1 at 96, 258) Furthermore, at trial, Crane not only conceded that

Mixon had made it necessary for Gallian to obtain this extra verification document, but Crane further indicated that he [Crane] understood that Gallian was additionally required to obtain for Crane the original substitution document itself. (T1 at 144-46) As a corollary thereto, Gallian testified that, having once personally verified the authenticity of the document, he would not have procured a second verification and could not obtain the original substitution as expressly requested by Mixon as a condition to closing. (T1 at 285-86)

Beyond imposing this additional condition, which, by reason of the negotiations, was contrary to the understanding of Respondents, the trial court expressly found that the cover letter of Mixon had not made the acceptance unconditional. (Finding of Fact No. 19)

Though not expressly a portion of the trial court's opinion, it becomes clear from an examination of the record that prior to the posting of Mixon's letter on February 21, one additional factor had been set forth by Respondents as a condition to Appellants' acceptance of Respondents' offer. On February 11, 1985, Gallian drafted P-13, a letter to Bishop indicating that his request on Crane's behalf for an accounting on Timberbrook should be moot in the event Crane sold his partnership interest in Timberbrook. This letter was copied to Mr. Mixon, California counsel for Clifford Crane. (P-13) Having not received the letter, Bishop filed Civil No. 85-066 on February 12, 1985, and received Gallian's letter (P-13) a day latter on February 13, when

Barry Church was served. On the 15th of February, Gallian and Bishop spoke, and Bishop wrote a letter confirming that conversation, indicating that the offer of Respondents to purchase Appellants' interest in the partnership had not yet been accepted as a settlement offer on the accounting lawsuit, and that until Appellant did in fact accept that settlement offer, Bishop had been instructed to proceed with the lawsuit. This letter from Bishop's office (P-15-A) was also copied to Appellants in California. Thus, both Gallian and Bishop understood that a condition to the purchase of Appellants' interest was the termination of the accounting suit. Absent the termination of that suit, Respondents felt no duty to close. (T2 at 27)

While the Appellant Clifford Crane conceded that, had he received the money and the deed, he would have dismissed the accounting suit, he conceded on cross-examination from Respondents' counsel that he "may not have" communicated this information to Mr. Gallian. (T2 at 43-44) Gallian firmly testified that he never heard one word about the accounting suit being dismissed as part of the closing from Mr. Crane. (T2 at 46)

Prior to the acceptance of an offer, the offeror may modify the terms of the acceptance at any time. Appellants' counsel, Bishop, indicated that Crane had not accepted the settlement offer on February 18, 1985. (P-15-A) This letter, copied to Crane, set forth the materiality of that dismissal to the unqualified acceptance of Respondents' offer. Appellants, however, maintained civil no. 85-066 up to and including the time of trial.

Appellants' failure to communicate that, as a portion of the acceptance, the accounting suit would be dismissed is a material failure in unequivocally accepting Respondents' offer as that offer became modified after notice of the lawsuit reached Respondents. Crane's testimony, uncommunicated to the offeror, that he would have dismissed the lawsuit is wholly ineffective. What Crane would have done, simply stated, is not enough. The acceptance of this condition was material to the offer as it stood on February 21, 1985, when Mixon mailed P-18 with its enclosures. Nothing in that letter, however, expresses to the escrow agent that the accounting suit, filed eight days prior to its mailing, would ever be dismissed, and a copy of Mixon's letter (P-18), in point of fact, was never mailed to Gallian.

V.

EQUITY COMPELLED THAT APPELLANTS NOT PREVAIL IN THE INSTANT SUIT.

The general rule in Utah is that equity reserves its rewards for those who are themselves acting in fairness and good conscience, or, in other words, to those who have come into court with clean hands. Jacobson v. Jacobson, 557 P.2d 156 (Utah 1976). In 1979, the Utah Supreme Court, in a unanimous opinion, indicated that all parties to a proposed contract "are obliged to proceed in good faith to cooperate in performing the contract in accordance with its expressed intent." Ferris v. Jennings, 595 P.2d 857 (Utah 1979). In reviewing the entirety of the pleadings and the testimony before the trial court, it becomes clear that Mixon was

retained simply to get more money than what Crane in principle had agreed to accept. Even Mixon admitted that Crane had initially agreed to sell for $175,000.00. (Mixon at 31) Crane admits to this oral agreement as well, but retained Mixon solely for the purpose of getting more money. (See T1 at 63, 69.)

Simultaneous to Mixon's first conversation with Gallian on January 4, Crane also retained Bishop, who, not knowing of the offer to purchase Crane's interest, proceeded diligently to obtain an accounting of the Timberbrook partnership, finally resulting in the filing of a lawsuit on February 12, 1985. While the filing of the lawsuit alone is not an example of bad faith, the timing of this lawsuit, coupled with the fact that Bishop, Crane's Utah attorney, had no prior knowledge of the ongoing negotiations to purchase Crane's interest in Timberbrook, created a situation which put Respondents between the proverbial "rock and a hard spot." In effect, Crane was attempting to negotiate an increase in the money offered by becoming a proverbial "thorn in the side" of the partnership. Indeed, Respondents have urged that the maintaining of this suit alone constitutes an implied and continuing rejection of Respondents' offer. Bishop himself conceded that he knew nothing of the ongoing negotiations to purchase Crane's interest until receiving Gallian's letter on February 13, 1985. (T1 at 248-51.)

Based upon the foregoing, Respondents suggest to the Court that though the trial court made no finding from the evidence before it, the actions of Crane clearly indicate a continuing

unwillingness to be bound by the proposal offered by Gallian. (R 332 at 4-6) Respondents suggest that Crane's masked or veiled intentions, his lack of credibility, and the fact that his testimony was largely impeached by both of his counsel, indicate that he did not go before the trial court with clean hands and does not, apart from his counsel, stand with clean hands before this Court. As Respondents' counsel has previously indicated, Appellants's counsel have acted with full integrity throughout this case. Appellant, however, standing alone, does not qualify to receive equity and obtain a decree of specific performance under the laws of the State of Utah.

CONCLUSION

The judgment entered by the trial court, The Honorable J. Philip Eves presiding, should be affirmed. Having accurately assessed the credibility of the witnesses before it, the trial court's findings are amply supported by the record on appeal; they should not be reversed unless clearly erroneous. Appellant has not overcome this burden.

The testimony before the trial court clearly sustains a valid and timely revocation of Respondents' initial offer to purchase Appellant Crane's interest in Timberbrook. Acceptance required the physical tender of documents to escrow, which act had not been accomplished due to Appellants' own delay in responding to the offer.

Beyond the above, Appellants' ultimate response proposed

the necessity of additional conditions as a precedent to closing and, thus, constituted a counteroffer. Lastly, by reason of the ambivalent and duplicitous actions of Appellant Crane, Utah law would preclude his requested recovery for specific performance.

Respectfully submitted this 17th day of June, 1988.

MICHAEL D. HUGHES, OF
THOMPSON, HUGHES & REBER

AFFIDAVIT OF MAILING

I hereby certify that four full, true and correct copies of the above and foregoing **RESPONDENTS' BRIEF ON APPEAL** was placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 17th day of June, 1988, addressed as follows:

Willard R. Bishop
P.O. Box 279
Cedar City, Utah 84720

ORIGINAL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR IRON COUNTY, STATE OF UTAH

CLIFFORD G. CRANE and BONNIE CRANE, husband and wife, Plaintiffs, vs. TIMBERBROOK VILLAGE LIMITED, a Utah Limited Partnership; HEART MARKETING AND DEVELOPMENT, INC., a Utah Corporation, in its capacity as general partner of Timberbrook Village Limited; LEISURE SPORTS, INCORPORATED, a Utah Corporation; and DIXIE TITLE COMPANY, a Utah Corporation, Defendants.	Civil No. 85-281

REPORTER'S TRANSCRIPT
OF
FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE THE HONORABLE J. PHILIP EVES, DISTRICT JUDGE

August 5, 1987

APPEARANCES:

For the Plaintiffs: BISHOP & RONNOW, P.C.
Attorneys at Law
By: WILLARD R. BISHOP, Esq.
36 North 300 West
Cedar City, Utah 84720

For the Defendants: THOMPSON, HUGHES & REBER
Attorneys at Law
By: MICHAEL D. HUGHES, Esq.
148 East Tabernacle Street
St. George, Utah 84770

PAROWAN, IRON COUNTY, UTAH, WEDNESDAY, AUGUST 5, 1987

12:02 p.m.

-oOo-

P R O C E E D I N G S

THE COURT: We are back in session. It's two minutes after twelve noon. The parties are present with their counsel.

I have reviewed the exhibits which were admitted in the trial as well as the law which has been supplied by the parties. I make the following findings of fact.

On November 13th, 1985 the parties had an oral agreement in principle which was to be reduced to writing, signed and deposited in escrow, along with other items, to complete the transaction and thus the agreement. Those items were to include money, release from a construction loan, a deed and assignment. Some of those items had not been discussed nor settled in the oral agreement. On November 20th, 1985 money was placed in escrow and a release occurred, but that was not placed in escrow and was not communicated to Crane.

Nothing more of significance happened until January of 1985 when Mr. Bishop was retained to obtain an accounting by Mr. Crane, and he notified Mr. Gallian

and others of his -- of that intent by letter both in January and early in February. I find that that action indicates that Mr. Crane did not feel that he had a binding agreement at that time, but was in the position of being in receipt of an offer which he was either free to accept or reject.

On February 11th, 1985 Mr. Gallian sent a letter to Mr. Mixon redefining the terms of the agreement, including Crane's transfer of the 20 percent to Leisure Sports and the five percent to Timberbrook, and the statement that the escrow agent would then disburse $175,000 to Crane and Church would execute a warranty deed for the condo.

Also on February 11th, 1985 Mr. Gallian sent a letter to Mr. Bishop explaining his contact with Mixon and reaffirming the existence of the terms of the offer, and stated that the accounting problem appeared to have been solved by Crane's inspection of the books. He again asks that the documents which were outstanding be placed in escrow to complete the formation of the contract and "the deal," as he calls it.

On February 13th, 1985 Mr. Crane told Mr. Bishop that he had not yet accepted the outstanding offer; that he wanted to go ahead with the accounting. On the same date, Mr. Crane signed the outstanding

agreements and deposited them with Mr. Mixon, his attorney in California.

On February 12th, 1985 the accounting lawsuit was filed by Mr. Bishop. I note that that had been completed by Mr. Bishop in preparation for filing on February the 6th, 1985.

On February the 15th, 1985 Mr. Gallian and Mr. Bishop spoke on the telephone after Mr. Gallian learned of the existence of the lawsuit. During that discussion the terms of the agreement were still outstanding and were not revoked.

On February the 18th, 1985 Mr. Gallian and Mr. Church met and decided the deal was off, but at that time did not communicate their decision to anyone. On February the 18th, 1985 Mr. Bishop sent letters to Mr. -- or sent a letter to Mr. Gallian stating Crane's position of February 13th, 1985. Also on February 18th, 1985 Mr. Mixon dictated the letter which was mailed on February 21, 1985 with which he sent the signed agreements which he had been given by Mr. Crane for deposit in escrow, and also with which he sent a letter stating conditions and documents that he felt were necessary prior to the closing of the escrow.

On February 22nd, 1985 Mr. Crane called Mr. Gallian, and I believe that he was told at that time

that the deal was off. As it turns out, however, and as you will find in a few minutes, it doesn't really make any difference whether he was told that on the 22nd or the 27th. He also called Mr. Westbrook and Nebraska to determine the status of the release from the construction loan and the escrow file.

Based on the testimony of Mr. Westbrook, Mr. Crane, and Mr. Gallian, as well as the postmark on the Mixon letter, I find that the acceptance of the sale terms had not reached the escrow on the morning of February 22nd, 1985, but arrived after Mr. Crane had been told, as had Mr. Westbrook, that the deal was off.

Throughout the communications leading up to February 22nd, 1985 Mr. Crane considered the sales agreement documents merely an offer which he was free to accept or reject, and not a memorialization of a binding agreement. That is evidenced by his own actions and his communications to his attorneys and their communications to Mr. Gallian.

Mr. Gallian, as representative of Timberbrook, considered the status or the posture of the matter in the same way in that he felt that the oral agreements, if any, were unenforceable and that what was outstanding was an offer which Mr. Crane could accept or reject.

Finally, I find that Mixon's letter of February 18th, 1985, which accompanied the two sales agreements which were deposited in escrow, was a conditional acceptance of the outstanding offer, and in fact created a counteroffer requiring Timberbrook to supply a new document not previously part of the offer, that document being a verification of the authenticity of the release from the construction loan.

The conclusions of law I draw from that are these:

One, that first of all, whether both parties intended that an offer and acceptance, I don't think the law can assume that they had a completed oral agreement, and in this case they both did clearly understand that there was an offer outstanding which Mr. Crane could accept or reject.

Secondly, the plaintiff has the burden of proving the terms of the agreement and the formation of the contract, and in this case the plaintiff has failed to carry that burden.

Third, this quote, "agreement," unquote, actually constituted an offer without consideration and was not revocable -- not irrevocable and could not be revoked at any time prior to proper acceptance by Mr. Crane. "Proper acceptance" under these circumstances

was the deposit of the signed agreements in escrow.

Fourth, the oral revocation of the agreement was communicated to Mr. Crane prior to his acceptance of the offer or attempting to accept the offer by placing the signed agreements in escrow or by communicating his acceptance to the offerer.

Five, the receipt of the signed documents in escrow after Crane was informed by Gallian that the deal was off did not create an enforceable contract, and especially in light of the additional condition imposed on the closing by Mr. Mixon's letter, but instead constituted a counteroffer conditioned upon Timberbrook's supplying the verification previously mentioned.

Sixth, no enforceable contract was created under these facts because the offer was revoked prior to its unequivocal acceptance, and the purported acceptance was in fact a counteroffer which was never accepted.

Therefore, judgment for the defendants and against the plaintiff. No cause of action.

Mr. Hughes, will you prepare appropriate findings of fact --

MR. HUGHES: I will, your Honor.

THE COURT: -- and conclusions of law and judgment?

MR. BISHOP: Mike, are you going to order a copy of the ruling?

MR. HUGHES: Yes.

MR. BISHOP: If he will, I would like a copy.

THE COURT: Anything further to take place in this matter?

MR. BISHOP: No, your Honor.

MR. HUGHES: No, your Honor. Thank you.

THE COURT: We are in recess in this matter.

(The proceedings were recessed.)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR IRON COUNTY, STATE OF UTAH

CLIFFORD G. CRANE and BONNIE CRANE, husband and wife, Plaintiffs, vs. TIMBERBROOK VILLAGE LIMITED, a Utah Limited Partnership; HEART MARKETING AND DEVELOPMENT, INC., a Utah Corporation, in its capacity as general partner of Timberbrook Village Limited; LEISURE SPORTS, INCORPORATED, a Utah Corporation; and DIXIE TITLE COMPANY, a Utah Corporation, Defendants.	REPORTER'S CERTIFICATE Case No. 85-281

I, LAURIE L. STUCKI, hereby certify that I am an acting official court reporter for the above-entitled Court, duly registered and licensed to practice in the State of Utah; that on the 5th day of August, 1987, I appeared before the above-named Court and reported the proceedings had in the above-entitled cause of action; and that the foregoing transcript contains, to the best of my ability, a full, true and correct transcription of said proceedings.

Dated this 7th day of August, 1987.

LAURIE L. STUCKI
Certified Shorthand Reporter
Utah License Number 236

ADDENDUM "2"

THOMPSON, HUGHES & REBER
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IN THE DISTRICT COURT OF IRON COUNTY, STATE OF UTAH

CLIFFORD G. CRANE and BONNIE CRANE, husband and wife, Plaintiffs, vs. TIMBERBROOK VILLAGE, LTD., a Utah Limited Partnership; HEART MARKETING and DEVELOPMENT, INC., a Utah corporation, in its capacity as general partner of TIMBERBROOK VILLAGE, LTD.: LEISURE SPORTS, INC., a Utah corporation; and DIXIE TITLE COMPANY, a Utah Corporation, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 85-281

THIS MATTER having come on for trial on the 4th and 5th of August, 1987, and the Plaintiffs, Clifford G. Crane and Bonnie Crane, having been represented by their attorney of record, Willard R. Bishop, and the Defendants collectively represented by their counsel of record, Michael D. Hughes, and the Court having heard the testimony of the witnesses, having received the evidentiary support, both of the Plaintiff's complaint and the defenses proposed by

Defendants, and the matter having been submitted upon oral argument by both counsel,

NOW THEREFORE, the Court hereby enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The Court finds that the pleadings were properly joined for trial.

2. The Court finds that Clifford G. Crane had purchased a 25% interest in Timberbrook Village, Ltd., a Utah limited partnership, with its principal place of business in Iron County, Utah.

3. The Court finds that Leisure Sports, Inc., a Utah corporation, together with Heart Marketing and Development, Inc., a general partner of Timberbrook Village, Ltd., desired to repurchase the interest of Clifford Crane in said partnership.

4. The Court finds that as of November 13th, 1985, Plaintiffs and these Defendants had reached in principle an oral agreement which was to be reduced in writing, signed by the Plaintiffs, deposited by the Plaintiffs at Dixie Title Company, along with assignments of their partnership interests, and that these requirements were necessary to complete the transaction.

5. The Court finds that some but not all of the items had been discussed and settled in the oral agreement, but that they included, among other things, transfer of money, release of the Plaintiffs from the guarantee of a

construction loan, preparation of a deed by the Defendants, and the preparation and completion of two assignments by the Plaintiffs.

6. The Court finds that on November 20th, 1985, the Defendants, Leisure Sports, Inc., a Utah corporation, and Heart Marketing and Development, Inc., caused to be placed in escrow $175,000 in reliance upon their belief that a deal had been struck and that, further, Leisure Sports, Inc., by and through Mr. Russell Gallian, one of its principals, obtained release of the Plaintiffs from the construction loan. The Court finds, however, that said release was not placed in escrow at this time and was not communicated to the Plaintiffs.

7. The Court finds that on November 13th, 1984, Russell Gallian, on behalf of Leisure Sports, Inc., and Heart Marketing and Development, Inc., did enclose documents requesting their execution and delivery to Dixie Title Company to the Plaintiffs Clifford Crane and Bonnie Crane. These documents were marked at trial as P-7, P-8, and P-9, respectively, and were received into evidence.

8. The Court finds that nothing more of significance happened until January of 1985, when the Defendant Clifford Crane, acting through his attorney, Dean Mixon, contacted Mr. Bishop, an attorney in Cedar City, Utah, and retained Mr. Bishop for the purposes of obtaining an accounting on Timberbrook Village, Ltd. The Court finds that Crane's action in retaining both Mixon and Bishop

evidences Crane's feeling there was no binding agreement at the time, but that he was in a position of being in receipt of an offer regarding which he was either free to accept or reject.

9. The Court finds from the evidence that the thrust of Mixon's conversations with Gallian were to increase the amount of money to be paid Plaintiffs, but that in February of 1985, Mixon expressed a concern over the releasing of the Plaintiffs from a loan guarantee which had heretofore been a part of the parties' negotiations. The Court finds that by Exhibit P-13, Mr. Russell Gallian forwarded to the offices of Mr. Mixon a copy of a substitution of guarantor, by the text of which the Plaintiffs were both released from any loan guarantees related to the Timberbrook Village, Ltd. partnership. The Court further finds that the original of such substitution was retained by the bank. The Court finds that by P-12, the Defendants Heart Marketing and Development, Inc., and Leisure Sports, Inc., once again renewed their offer for Crane to execute Exhibits P-8 and P-9 and return the same to the Defendant Dixie Title Company so that escrow could be completed. In this letter, Gallian once again redefined the terms on behalf of these Defendants, of what he understood the agreement to be, including transfer of the 20% to Leisure Sports and the 5% to Timberbrook. Gallian further stated in such letter that the escrow agent would then disburse $175,000 to the Plaintiffs and that Barry Church,

on behalf of Heart Marketing and Development, Inc., a general partner to Timberbrook Village, Ltd., would then execute a warranty deed for the condominium which was additional consideration in the transaction.

10. The Court finds that simultaneous with the transfer of the letter to Mixon, Gallian, by way of P-13, wrote a letter to Mr. Willard R. Bishop explaining the contact of the Defendants with Mixon, Cranes' California attorney, and reaffirming to Bishop the existence of the terms of the offer. Gallian further stated his belief that the accounting problems appeared to have been solved by Crane's prior inspection of the books and, once again, the question indicated that these Defendants were awaiting documents to be placed in escrow at Dixie Title Co., at which time the closing would be completed and the accounting problems resolved.

11. The Court finds that on February 12th, 1985, the lawsuit was filed for an accounting against Timberbrook Village, Ltd., and Heart Marketing and Development, Inc., a Utah corporation, and that on February 13th, Mr. Barry Church, as a principal of Heart Marketing and Development, Inc., was served with the complaint in said lawsuit. The Court finds that on February 13th, Mr. Crane advised Mr. Bishop, his Utah counsel, that he had not accepted the outstanding offer made to him by the Defendants, Heart Marketing and Development, Inc. and Leisure Sports, Inc., and that Crane desired to proceed with an accounting until

the settlement was ~~offered~~ accepted SH. Crane did not in fact ever accept it. The Court finds that the thrust of this information was SH relayed to Gallian orally by conversation on the 15th day of February, 1985, and reconfirmed by a letter received as Exhibit P-15 over the signature of Willard R. Bishop, dated February 18th, 1985.

12. The Court finds that February 13th, 1985, SH Plaintiffs executed P-8 and P-9, deposited said exhibits with Mr. Mixon, Plaintiffs' attorney in California. The Court finds, however, that such information was not conveyed to Mr. Bishop, Plaintiffs' attorney in Utah. The Court finds that by reason of the same, Bishop advised Gallian on February 15th, 1985, that Crane had not yet accepted the offer based upon Crane's February 13th conversation with Bishop, but that during that discussion, terms of the offer were still outstanding and had not yet been revoked.

13. The Court finds that on the same day that Mr. Bishop sent his letter, Exhibit P-15, to Mr. Gallian, that Gallian and Church met on behalf of Timberbrook Village, Ltd, Heart Marketing and Development, Inc., and Leisure Sports, Inc., and decided that the deal was off. This decision, however, was not then communicated to anyone. The Court finds that while Mixon dictated a letter on February 18th, 1985, said letter was not mailed until the afternoon of February 21st, 1985, as per the postmarked envelope which had been received into evidence. In this letter, sending Exhibits P-7 and P-8, Mixon also stated certain conditions,

including additional documents which were to be received, which Mixon stated were necessary prerequisites to the closing of escrow.

14. The Court finds that on the morning of February 22nd, 1985, Mr. Crane called Mr. Gallian and the Court finds that in the first portion of that conversation, Gallian advised Crane that the deal was off.

15. The Court also finds that subsequent to this conversation with Gallian, Crane phoned the bank in Nebraska to determine the status of the release of the Plaintiffs from the construction loan and called Mr. Westbrook of Dixie Title to determine the status of the escrow.

16. The Court finds, basing its finding on the testimony of Mr. Westbrook, Mr. Crane, and Mr. Gallian, as well as the postmark on the Mixon letter, that the title company had not received Plaintiffs' acceptance as per the terms of the agreement on the morning of February 22nd, 1985. The Court finds that the agreement states, as do the cover letters of Gallian, said agreements were to be executed and delivered by the Plaintiffs in escrow to complete their end of the transaction. The Court finds that this event had not occurred when Mr. Crane had been told, as had Mr. Westbrook, by Mr. Gallian that the deal was off.

17. The Court finds that up through and including the date of February 22nd, 1985, the Plaintiffs considered sales agreement documents P-8 and P-9 merely as an offer which he free to accept or reject, not a memorialization of

an agreement binding upon him. This finding is evidenced by the actions of the Plaintiffs and the communications of Mr. Crane to his attorneys, Mr. Mixon and Mr. Bishop, and their communications to Mr. Gallian on behalf of Timberbrook Village, Ltd., Heart Marketing and Development, Inc., and Leisure Sports, Inc.

18. The Court further finds that Mr. Gallian, as a representative of these Defendants, considered the status of the parties' dealings in the same posture, to-wit, that the oral agreement, if any, was tenuous and unenforceable, and that what was outstanding was an offer that Crane was considering, but could accept or reject.

19. The Court further finds that the letter of Dean Mixon of February 18th, 1985, which accompanied Exhibits P-8 and P-9, and deposited in escrow, in fact, only conditionally accepted the outstanding offer and requiring that Defendants submit yet additional documents into escrow. As a result, the Court finds that Mixon's cover letter on behalf of Plaintiffs created a counteroffer requiring the Defendants to supply a new document not previously part of the offer, that document being a verification of the authenticity of the release of the Plaintiffs from the construction loan on Timberbrook Village, Ltd.

20. The Court further finds that at the close of evidence, the Plaintiffs moved that Defendants' counterclaim be dismissed and that the Defendants so stipulate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court hereby concludes as follows:

1. The Court concludes that both parties dealt with this transaction on the basis of an outstanding offer which required acceptance by the Plaintiffs. As a result, while the Court concludes that Gallian believed an oral agreement had been reached, the terms of the same remained subject to the Plaintiffs' acceptance and the Court specifically concludes that both parties understood there was an offer outstanding which Crane could either accept or reject.

2. The Court concludes that the Plaintiff seeking specific performance, has the burden of proving in a clear and convincing manner the terms of the agreement and the formation of the contract, and in this case, the Court concludes that the Plaintiff has failed to carry that burden.

3. The Court further concludes that P-8 and P-9 were indeed offers open to the Plaintiffs' acceptance without consideration, and, thus, could be revoked at any time prior to proper acceptance by the Plaintiffs. The Court finds that proper acceptance under these circumstances called for the deposit of Exhibits P-8 and P-9 executed by the Plaintiffs, in escrow at Dixie Title Company in St. George, Utah.

4. The Court concludes that the Defendants orally revoked their offer to Crane and communicated the same to the Plaintiffs prior to their acceptance of the offer and prior to any communication called for by the agreement or otherwise, by the Plaintiffs to the Defendants that their offer had, in fact, been accepted. The Court finds that thet subsequent receipt of P-8 and P-9 in escrow after such oral revocation of the offer, did not thereafter create an enforceable contract; this is so especially in light of the Court's conclusion that Mixon's cover letter, received as P-18, imposed an additional condition upon the closing and thus constituted a counteroffer conditioning Plaintiffs' acceptance of Defendants' offer upon Timberbrook Village, Ltd., supplying separate verification of the substitution of guarantor document previously mentioned. The Court finds that there was no enforceable contract created under these facts because the offer was properly revoked prior to its unequivocal acceptance and that the purported acceptance thereafter received by Defendant Dixie Title Company, was in fact a counteroffer which was never accepted, and that the Defendants never reinstated their offer.

5. The Court concludes that the Defendants counterclaimed on the basis of Plaintiffs' motion and Defendants' acquiescence in the same should be dismissed.

6. The Court concludes that Plaintiffs' case as against Defendants should also be dismissed with prejudice

on the basis of the aforementioned Findings of Fact and Conclusions of Law; no cause of action.

DATED this 24th day of August, 1987.

BY THE COURT:

J. Philip Eves

J. PHILIP EVES
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and accurate copy of the foregoing document, postage prepaid, to Willard R. Bishop, Attorney for Plaintiffs, P. O. Box 279, Cedar City, Utah 84720, this 17th day of August, 1987.

Sandy Hampton

SECRETARY